

## **Deontology's Travails**

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Deontology is a work in progress. The project is to specify what we owe one another by way of moral concern and consideration in terms of a set of fundamental moral rules that constitute constraints on morally permissible conduct (sometimes one may not do what would bring about greater good) and options (sometimes one is permitted not to do what would violate no constraint and bring about greater good). Successful completion of the deontological project would involve elaborating a particular mixture of constraints and options that fit together into a coherent view of what we morally owe to each other, one that yields implications of choice of conduct and policy on any circumstances in which we might find ourselves that accord with our considered judgments in an ideally reasoned reflective equilibrium.

Successful completion of the project is not visible on the horizon. Recent discussions meander into dead ends, impasses of thought, and small niches where a few likeminded individuals wrangle about minor details of doctrines that, to put it mildly, do not appear to be in the verge of commanding general allegiance.<sup>1</sup>

The tangles of deontological discussions have significance for the broader issue of the dispute between consequentialism and nonconsequentialism in ethics, because deontology looks to be the most promising version of nonconsequentialism. The consequentialist holds that one ought always to do an act, among those available for choice, that would bring about an outcome no worse than the outcome of anything else one might have instead have done. The standard for assessing outcomes as better or worse is given by impartial evaluation. There are endless wrinkles and minor qualifications to be considered, as well as the major issue of determining the appropriate outcome assessment standard, but by and large the structure of consequentialist morality is fairly well understood. However, it is likely that the most compelling alternatives to consequentialism have not yet been identified, so it is not possible to make a sensible definitive judgment in favor of consequentialism or nonconsequentialism. The sensible view is "wait and see." So all of us, whatever our moral leanings on the consequentialism versus nonconsequentialism issue, should welcome progress on the project of articulating the best and most plausible deontological morality.

Enter Larry Alexander, a distinguished legal theorist whose recent work on the morality of self-defense touches on fundamental problems in the articulation of moral constraints on permissible action. Throughout his career Alexander has been a restless as well as an innovative and creative thinker. He is continuously moving onto new theoretical ground. Building on some skeptical probes in the area of moral theory attempts to characterize the trade-off ratios that determine when it is morally acceptable to act against someone's moral right in view of the really bad consequences that refraining from this violation would allow to happen (Alexander 2000 and 2008), Alexander has boldly elaborated a new deontological doctrine (2016) that seeks to improve on the Lockean libertarian doctrine of morality as side constraints worked out by Robert Nozick (1974). (It is a profound tribute to Nozick's achievement that it has not been superseded in the more than 40 years since its publication.)

The core of Alexander's proposal is what he calls the "Means Principle" (MP). This principle "forbids actors from achieving otherwise good consequences by using, without their consent, others' bodies, labor, talents, or the resources that are rightfully theirs." Regarding the last phrase, Alexander explains that MP "forbids unconsented-to use of resources that could not have been obtained except by the possessor's use of his body, labor, or talents, or resources conveyed to him by others who obtained them similarly."

MP takes a stand both as to the content of moral constraints and as to the content of moral options. Each person is morally at liberty to act as she chooses, using her own body, labor, talents, and the resources that are rightfully hers, so long as she does not thereby violate the moral constraint embedded in MP. I take it that "forbids actors from achieving otherwise good consequences" in the formulation of MP is a rhetorical flourish. MP equally forbids nonconsensual use of the bodies and so on of others in ways that achieve bad consequences as well as good consequences.

Alexander follows Nozick and others in proposing that the core of deontological constraints establishes limits on being coerced or forced to contribute to production of good consequences. Being morally at liberty to save my bandages and medicines for my own future use even though you desperately need them right now, it would be wrong to force or coerce me to assist you by providing you the bandages and medicine you urgently need, and wrong for the state or any individual to impose punishment (that deprives me of any moral rights I otherwise possess) for my failure to aid you. However, I might be legitimately be vulnerable to criticism by appeal to nonenforceable moral principles.

Alexander proposes the Means Principle as the sole deontological constraint on the pursuit of good consequences. The constraint on using others does not forbid doing what will cause harm to others so long as one does not thereby benefit from the presence of these others. Gaining such a benefit would constitute using others in the ways MP forbids. This spare feature of the doctrine is one of its two highly controversial features; the other will be mentioned shortly. Alexander affirms a highly streamlined deontology. He illustrates this feature of his doctrine by rehearsing some trolley problems. Turning a runaway trolley that is hurtling down a track toward five who are about to be run over and killed onto a side track where the trolley will kill only one person is permissible, says Alexander. What one does harms the one but is not a causal means to advancing any good cause. One does not benefit from the presence of the one on the track; one would proceed in the same way even if he were not unfortunately present. The same verdict would hold if one exploded a bomb, destroying the tracks along which a trolley is hurtling toward five, and also killing a bystander. A rough test for permissibility is that one would do the same even if the person to be harmed were not there at all; one gains no benefit from his presence. In contrast, jiggling a bridge that spans the trolley tracks, causing a fat man to fall onto the tracks and block the trolley from hurtling along its path toward killing five who are stuck on the tracks ahead, would be a case in which the presence of the person harmed provides an opportunity for saving the five. The body of the fat man is used in ways that bring about greater good. This using violates the Means Principle.

These examples might call to mind the Doctrine of Double Effect (see Quinn 1989), but Alexander upholds MP as a non-state-of-mind principle. Neither one's

intentions nor one's beliefs play a role in determining whether one's actions are morally permissible.<sup>2</sup>

The first controversial feature of Alexander's deontology is its sparseness—what it leaves out. The second controversial feature is its absolutism, and more important, the underlying reasons that drive Alexander toward absolutism. Alexander is open to the possibility that the Means Principle is an absolute, exceptionless moral principle. MP holds at all times and places and it is always morally wrong, all things considered, to act against it. MP is exceptionless. This means that there are no values that compete against MP, and might be balanced against it, such that in some circumstances it makes sense to say that MP is morally outweighed by these considerations so that in these circumstances, all things considered, one morally ought to do what MP prohibits.

Here I am bowdlerizing Alexander's stated position, but bear with me. In his essay "The Means Principle" Alexander does not commit to upholding it as an absolute, exceptionless principle. He leaves open the possibility that it might be outweighed, perhaps in the situations of moral catastrophe invoked and then set aside by Nozick (What if by forcing someone to wiggle his nose just once you could save the planet from all global warming woes?). But there are reasons that drive Alexander toward an absolutist construal of MP, never repudiated by him. The reasons are forcefully articulated in an earlier essay, "Deontology at the Threshold," and they constitute perhaps his most interesting contribution to the project of constructing a plausible deontological ethics. His skeptical thoughts on moral thresholds join together with the Means Principle to make a formidable doctrine.

### **Preliminary statement of problems in Alexanderism.**

This essay raises some objections to Alexander's views. In this assessment of Alexander on deontology I ignore the momentous background issue of consequentialism versus nonconsequentialism in moral theory.<sup>3</sup> Coming to terms with the case for and against consequentialism is a venture left for another day. If I am right, any such assessment must anyway be provisional pending a full articulation and evaluation of the varieties of deontology and their merits.

This essay focuses on intramural criticisms of Alexander from within the deontological camp. I narrow the topic further by setting aside the large division between those who believe and those who deny that the state of mind of an agent, in particular her intention, plays a role in determining the permissibility of what she does.

First, I interpret Alexander as finding support for his view that the Means Principle might well be exceptionless and absolute in his view that threshold deontology under examination proves to be very implausible and likely incoherent. But threshold deontology is plausible and coherent. The support collapses. Furthermore, a plausible position in this domain is *aggregation*. This holds that for any wrong however horrendous that one person might do to a single other person, there is some quantity of trivially small benefits accruing to a sufficiently large number of other people, such that if doing the wrong brings about that amount of offsetting benefit, and all else is equal, then doing it is, all things considered, morally permissible. Benefits and wrongs trade off against each other in the space of moral reasons. But threshold is less controversial than aggregation and uncertainty about the latter should not incline us to take seriously Alexander's objections against the former.

Stripped of the support of the rejection of threshold, the claim that the MP is absolute and exceptionless rests on appeal to intuitions about cases, and on this terrain Alexander has no argument against anyone who has the intuition that in some circumstances we are morally bound by enforceable duties to help others in need and sometimes by enforceable duties to allow others to appropriate our bodies and talents to provide such help.<sup>4</sup> If I refuse to carry out an easy rescue of a child drowning in a shallow pond, and you can save the child only by credibly threatening to impose costs on me if I balk at the rescue, you are morally permitted to coerce me in this way and to carry out your threat if I fail to save the child, given some further uncontroversial premises are in place. Suspicion that once enforceable Good Samaritan obligations are countenanced, they will be incapable of being cabined, and will inevitably obliterate claimed moral options for practical purposes, fuels the libertarian denial that any Good Samaritan obligations should be countenanced. But this is just the same radical skepticism about threshold deontology in another guise that we will have already seen reason to reject.

A second objection to the Alexander version of deontology is that from the standpoint of seeking to develop and explore the most plausible versions of nonconsequentialism, Alexander's doctrine is too concessive to consequentialism along contestable fronts. In particular, Alexander's view is both aggressive, in suggesting that what the Means Principle taken by itself forbids could never be permissible all things considered, and timid, in holding that in situations in which the Means Principle does not apply, it is always morally permissible to do what would bring about even slightly better consequences than would be brought about by scrupulously adhering to any other claimed deontological constraint. This position makes too much of MP and too little of other candidate deontological considerations.

Alexander's enterprise appears to be driven in part by the hope that by simplifying and streamlining deontology we might well be strengthening the fortress. Less can be more. There is an undoubted attraction to leaving behind the endless coils and complications of present-day deontological theories. I shall suggest that the promise and attraction largely turn out to be illusory. (Readers will have to judge whether I am mistaken in attributing to him any commitment to the claims I am contesting.) In a nutshell, the problem is that unwarranted skepticism about commensurability proves to be the main reason to jettison claims that individuals have rights not to be harmed by others in certain ways, even when the harmful actions claimed to be wrongful would not be causal means to gaining advantages for the harming agents so that they benefit from the presence of the harmed victims.

A third criticism, made in passing, is that Alexander's defense of his right-wing libertarianism takes a swipe at left-wing libertarianism that does not inflict damage on its target. Here Alexander invokes the Means Principle to place limits on permissible appropriation of unowned stuff as privately owned resources. Quite aside from any doubts one might entertain regarding the acceptability of the Means Principle, its invocation in this context, we should agree, is misplaced.

### **Threshold constraints.**

A threshold deontologist holds that moral constraints on permissible action are significant pro tanto considerations that do not necessarily determine in all circumstances what is morally permissible all things considered. A constraint might be counterbalanced

by other constraints or by other types of moral considerations. Especially salient here are lesser evil justifications. Acting in accordance with a constraint in some particular circumstances might bring about a lot of harm or prevent a lot of good, and when these consequences are sufficiently bad, acting against the constraint is the lesser evil.

If the Means Principle is the sole deontological constraint, the problem of balancing constraints against constraints does not arise. Alexander holds that when lesser evil justifications are clearly articulated, they reveal themselves to be implausible and of doubtful coherence.

Any moral view that includes a threshold, a precise point, on one side of which, acts are morally permissible, and impermissible on the other side, will be affirming a discontinuity. Is this troublesome? How can a tiny, tiny difference in value make the difference between an act's being permissible and impermissible?

It is not clear at the outset that we should see any problem here. There are discontinuities in nature; why not in ethics? A boulder precariously balanced on a slope is not moving at all. Pushed by a tiny, tiny force, it crashes hundreds of feet to the canyon floor. This can happen. Perhaps similar phenomena occur in ethics.

One might hold that any characterization of a concept will be tracing thresholds or boundaries in thought. When the characterization concerns moral concepts that figure in moral principles of right and wrong, there will be discontinuity at the threshold. If the set of moral constraints includes a prohibition on lying, there will be some specification of what qualifies as a lie, so that within the range of deceptive behaviors, some deceptions will fall on one side and some on the other side of the boundary dividing lies and non-lies. One might be skeptical that the line drawing is always arbitrary.

The problem that troubles Alexander is slightly different. He imagines that, for example, we know what is appropriation or using of what belongs to another and what is not and we are agreed, these appropriations are morally impermissible. We are affirming threshold deontology when we add that when refraining from doing what the constraint against appropriating prohibits would bring about consequences that are sufficiently bad, then a tipping point is reached, and what had been morally wrong and impermissible becomes morally permissible all things considered. The picture is that there is a standard of outcome or consequence assessment and that consequences vary in degree continuously in value and disvalue as so many points along a line. At a threshold, the tipping point, the impermissible becomes permissible. Alexander proposes that the most promising version of threshold deontology will specify a ratio, exceeding which swings open the door of permissibility. The ratio might be how bad it will be for rightholders if a moral constraint is not respected to how bad it will be for nonrightholders if the constraint is respected. The ratio might vary by type of constraint.

If there is a problem here, a further feature of any sensible deontology insightfully treated by Alexander in another context may go some way toward easing it.<sup>5</sup> Suppose a threshold for permissible infringement of a moral right in deontology is just barely passed. The act that just barely crosses the threshold is just barely permissible. If a further very small consideration pops up that tells against permissibility, this very slight consideration might push the act back into the impermissible range. Moreover, acts that would infringe the moral right and that lie just barely below the threshold of impermissibility are just barely impermissible. Lying to a friend about some small matter such as the exact location of my socks might be wrong, but just barely wrong. I should

not feel more than just barely perceptibly guilty for doing this act, and if compensation is owed to the person to whom the lie is told, the compensation will be very small. The moral discredit that accrues to me in virtue of doing this wrong act will be very small. In contrast, if just for the fun of it I lie to someone about the exact location of the cliff edge she is trying to avoid, knowing that this will cause her along with several friends tied to her to plummet to their undeserved deaths, what I do is a long way from the boundary of the permissible, and calls for guilt on my part, indignation on the part of others, punishment of me for the misdeed.

Rightness and wrongness are scalar notions. They vary by degree. This is fully compatible with the existence of thresholds separating rightness and wrongness.

Why resist the idea that moral permissibility is an either-or notion that supervenes on underlying considerations that vary by degree? It might be thought that that this picture of ethics leaves no room for moral constraints that are anything but conventions. Here's a line of thought.

1. The Means Principle is a significant, substantial constraint on what it is morally permissible to do.
2. If a magnitude of value or disvalue exceeds a certain point, the Means Principle constraint is overridden, and acting against it is morally permissible.
3. There is no nonarbitrary way of selecting the certain point at which the Means Principle constraint is overridden.
4. If there is no nonarbitrary way of selecting as the certain point at which the Means Principle constraint is overridden, it is not unreasonable to select a lesser magnitude, rather than any point previously selected.
5. If it is not unreasonable to select a lesser magnitude rather than any point previously selected, as the certain point at which the Means Principle constraint is overridden, it is not the case that the Means Principle is a significant, substantial constraint on what it is morally permissible to do.

3, 4, and 5 are hard to deny according to Alexander, but 1 must be true, so 2 must be false. Hence, we must suppose the Means Principle to be absolute and exceptionless. The advocate of threshold deontology denies 3, and can then consistently affirm 1, 2, 4, and 5.

In support of 3, Alexander appeals to an argument advanced by Anthony Ellis:

1. There is some number [N] at which the act that was wrong becomes right.
2. There is no non-arbitrary way of specifying [N].
3. The difference between what is morally right and what is morally wrong cannot be arbitrary.

The three claims cannot be true together. The argument is that 2 and 3 are unimpeachable, so 1 must be false.

Response to Ellis and Alexander: The argument seems to just presuppose that a substantive judgment, for example, to the effect that kicking someone in the shins to prevent someone else suffering exactly that same harm is wrong but kicking someone in the shins to prevent someone else from suffering a much greater harm is permissible, must be arbitrary in a way that renders the judgment indefensible. I do not see any basis for this presupposition except a general skepticism about moral intuition. The idea that the fact that an act one is contemplating would inflict harm on someone is a reason not to do it rests on a substantive moral judgment, which could coherently be denied. So does

the idea that the fact that an act that one is contemplating would inflict a greater rather than a smaller harm on someone is a greater rather than smaller reason not to do it. But if the former idea can be defensible, why not the latter? Next step: The fact that an act one is contemplating, that would inflict harm on someone, would also bring about benefit for another person, lessens the moral reason one has not to do the contemplated action, based on its inflicting harm on someone. If one accepts this, then we should also accept that the fact that an act one is contemplating, that would inflict harm on someone, would also bring about a greater rather than smaller benefit for another person, lessens to a greater extent the moral reason one has not to do the contemplated action, based on its inflicting harm on someone. The threshold deontologist holds that when the ratio of harm that would accrue to the rightholders if the right in question is not respected, to the harm that would in the aggregate accrue to nonrightholders if the right is respected, becomes sufficiently favorable, the impermissible rights-infringing act becomes permissible.

The skeptic then presses the question: exactly where does this threshold point lie? I take it that the skeptical question lacks purchase against range judgments. Kicking someone in the shins, when the individual has done nothing to forfeit her general right not to be harmed, is not permissible to avert similar shin-kicking harm to another that is in the range of 1.00001 to 1.00050 times larger, but is permissible to avert shin-kicking harm to another that is in the range of 3.00000 to 3.50000 times greater, says the threshold deontologist. These range judgments may be vague, and not exactly specifiable. This inexactitude that current intuitive judgment leaves might be deemed an epistemic matter or a matter of moral fact. Either way, the fact, if it is a fact, that we cannot confidently precisely fix the thresholds that are operative in threshold deontology at precise points, but only within a range, does not call into question the plausibility of range judgments or the coherence of claiming some to be true.

A complication here is that the Means Principle as construed by Alexander prohibits unconsented-to appropriation not unconsented-to appropriation that harms. MP forbids using someone against her will even when she benefits from the use. So if MP is overridden at some threshold, the threshold point cannot strictly be a point at which a set ratio of harms to rightholders to harms to nonrightholders is exceeded. See discussion three paragraphs down in the text.

Alexander endorses the suggestion that the explanation why one could not without arbitrariness draw a line at some determinate point and hold that action against a deontological constraint is impermissible up to the line and permissible beyond it is that any such procedure would involve “the weighing of incommensurables.” Deontological constraints say that acting against the stated constraint is intrinsically wrong, whereas in consequentialist calculation, all consequences trade off against one another, and all that matters is achieving the best overall consequences. But in this context, appealing to this pronouncement against the threshold deontologist is just straightforwardly begging the question at issue.

Alexander: “For the threshold deontologist’s claim is that at N [the border of permissibility], consequences *justify* acts that are otherwise intrinsically wrong. But it is difficult to see how consequences could do this unless consequences and intrinsic wrongness were commensurable along some scale.” I have trouble reading this as anything other than a flat, blanket rejection of threshold deontology. Its basic thought is that good consequences that arise by infringement of deontological constraints are to be

discounted, to some degree, by that very fact. A more stringent deontological constraint imposes greater discounting. From the get-go, consequences and intrinsic wrongness are being balanced against each other, and balancing implies measurement. (Moreover intrinsic wrongness itself is woven partly from harm, a bad consequence.)

This seems to be the nub of the issue for Alexander, so I should explicitly state the view he appears to be rejecting. There is a moral constraint, for example a moral rule that forbids lying. This rule generates moral reasons, of a strength that varies, depending on what is at stake. (It is morally worse to lie to my sister about the character of the person she is planning to marry than to my wife about the exact sweetness of the ice cream she is planning to consume.) Think of the moral reasons as giving the moral disvalue of doing the act I am considering doing. There might be counterbalancing considerations, good consequences the lie would bring about. The moral constraint bars me from doing an act that would bring about the best reachable outcome but at the cost of violating the constraint. But as the good consequences of telling the lie are gradually increased, at some tipping point the lie becomes just barely permissible. The consequences properly weighted give reasons for lying that amount to moral value points that offset the moral disvalue of telling the lie. There is a common scale of moral reasons that vary in strength, or moral value and disvalue scores if you prefer.

Although the view just sketched is obviously coherent, one could be skeptical that the moral reasons measurements it relies upon can actually be made. Such a skepticism is possible. I do not attempt here to argue against it. All I claim is that a skepticism so corrosive as to rule out any commensurability in this sort of case will eat away and destroy any claims of commensurability in ethics including ones on which Alexander needs to rely to get his own position off the ground.<sup>6</sup>

Alexander suggests that complementing MP is some form of consequentialist reasoning. But weighing consequences involves balancing different types of consequences against each other. There are plural consequentialist values. The vacation we have planned will provide fun and boost our virtue but damage our friendship. How do we weigh these disparate goods and bads against each other?<sup>7</sup> If we can rely on ordinary methods of reflective equilibrium judgment here, why not when balancing constraints of varying moral stringency against better and worse outcomes of complying with constraints and infringing them?

Alexander writes, "If there is a deontological threshold or thresholds at which deontological rights give way to affirmative duties, then one might expect that moral outcomes in the neighborhood of such a radical discontinuity might seem weird or counterintuitive. And that expectation is borne out."<sup>8</sup> Alexander provides examples to illustrate the weirdness, which he takes to provide evidence against the threshold view.

A first comment is that such discontinuities are pretty much bound to occur in any ethics that countenances sharp cutoffs for decision. Consider an act consequentialist view that says one ought always to do whatever will bring about best consequences. Consider a range of cases, in each of which one might harm an individual, producing a negative consequence of exactly 10 to that individual. The act will also produce downstream good consequences, and in an array of cases these good consequences gradually increase by small increments up to 10.01. Here there is a radical discontinuity. When one has the option of gaining 9.99 at a cost of -10, the harmful act is forbidden, but if instead one can gain just over .01 more gain at the exact same cost, the act switches to



morally required. I do not know whether this feature of act consequentialist calculation qualifies as weird, but I see nothing counterintuitive here. With a slight increase in resultant good consequences an act's moral status can shift from forbidden to required.

Any trace of moral oddity here just results from the application of an either-or decision question—what is one required to do—to a situation in which the underlying moral phenomena are scalar and we are considering very small incremental shifts in the magnitudes of the underlying scalar phenomena. A sensible ethics will superimpose scalar judgment on the either-or schema. When the net balance of consequences shifts from barely negative to barely positive, and one's choice is limited to doing the act that produces this net balance of consequences or refraining from doing so, the act shifts from just barely wrong to just barely right. Here the shift in moral status from forbidden to required is not a big shift.

Same goes in deontology, one would suppose. A sensible deontology, applied to decision problems in which the moral difference between one act and another is slight, should not hold that the moral difference between the two acts is great. One might (barely) qualify as forbidden and another (barely) qualify as required, but doing the wrong act that is just barely wrong is not very wrong and choosing the right act rather than another option that is just slightly worse is just barely right.

Here is an example that conveys the flavor of Alexander's discussion on this point:

"A terrorist has captured and hidden 100 hostages in a number of locations. At each location he has planted a bomb that will automatically detonate at noon. The terrorist reveals this to the police and demands certain concessions from the government before noon; otherwise he will allow the bombs to kill the hostages.

"Luckily, the police have grabbed the terrorist's mother, who is in no way implicated in her son's terrorism. If they torture her, however, they believe that the terrorist will relent. And because 100 lives are at stake, the mother's right not to be tortured is overridden. So they begin torturing her on live television. Sure enough, after some severe suffering from his mother, the terrorist calls the police and asks them to relent. The police ask him for the location of the hostages and the bombs, and he tells them where one, and only one, hostage and bomb are located. Because only 99 hostages now remain at risk, the police can no longer torture the terrorist's mother."<sup>9</sup>

Alexander has stipulated that we are to suppose the threshold for torturing an innocent person is 100 lives at stake. One unit of torturing an innocent person (presumably combining severity of torture and duration of torture episode) is permissible to save 100 lives.

In his example, the police believe that they can inflict one unit of torture on an innocent person and thereby save 100 lives. As it turns out, this belief is wrong. The torture unit only brings about the saving of one life. The torture of this person is fact-relative wrong in the example. If the evidence available to the police warrants the belief that inflicting one unit of torture on the mother in these circumstances will save 100 lives, their act is evidence-relative justified.

Perhaps I am tone-deaf to deontological nuance, but I do not see anything in the example that suggests that thresholds for permissible infringement of rights are inherently counterintuitive, weird, or incoherent. The odd feature of the example turns entirely on the discrepancy between what the police believe and what the facts in the situation

actually are. But this feature can also crop up in a straight act-consequentialist assessment of the situation. The police might believe that torturing an innocent to a certain degree will bring about good consequences such that this act is the one, among the alternatives, that would bring about the overall best outcome, but in fact, their belief is incorrect, and their act of torture is not fact-relative justified.

Worse, similar discontinuities seem inevitably to be part of Alexander's preferred deontological morality that eschews thresholds. Alexander says morality categorically forbids using a person in certain wrongful ways as a means to bring about one's goals, no matter how morally valuable these goals might be. Alexander will have to provide some characterization of wrongfully using a person in the forbidden way, and this characterization is bound to admit a line between an act that just barely qualifies as using a person in the forbidden way and an act that just barely fails to qualify. This line might be almost indiscernibly thin and the difference between a forbidden act and a permissible act on Alexander's favored non-threshold morality will be very slight. I doubt that Alexander will be troubled by this feature of his view, and I doubt he should be troubled. But *mutatis mutandis*, the same goes for the threshold deontology he criticizes. Discontinuity is not a deal-breaker or knockdown objection to a deontological morality.

If course, one might soften the discontinuity, the sharp line between forbidden and permissible, by introducing a gray zone in which the act being contemplated is neither permissible nor impermissible but has a morally in-between, ambiguous status. And one may introduce shades of gray, further softening the discontinuity. (The darker the shade of gray, the closer we are to impermissible status, the lighter the shade the closer we are to permissible.) Perhaps one should carry out this maneuver. But if it is desirable, it will be just as available to a threshold deontologist as to a non-threshold deontologist of the Alexander school, and just as available to an act consequentialist.

### **Using a person as a means versus running roughshod over a person.**

An intriguing feature of Alexander's deontological doctrine is that the constraint against using the person or property of another to advance one's purposes is far more restrictive than the constraint against harming another when the presence of the other, or the presence of the other given there is some constraint against impinging on him in a way that harms him, is an obstacle to one's acting to advance one's purposes. In the cases that trigger Alexander's means principle constraint, the presence of another person or what belongs to him is an opportunity for the agent; she can do something to the victim that brings about benefit to her that would not have been available in the absence of that victim or of what belongs to him. If one is not appropriating what belongs to another in a way that benefits oneself, but rather doing something one would do, and do just as well, even if the other or his property of another was not present at all, then if what one does brings about damage to the other, the doing of it is morally permissible just in case the consequences of doing it are better than the consequence of refraining from doing it.

To see how Alexander's principles work together to constrain permissible action, consider two examples:

*Rescue I.* Jose is driving a truck bringing medical supplies to injured persons who will die if they do not swiftly obtain these medicines. There is only one road to the location if the injured, and Jose is driving along it. Sally through no fault of her own has

fallen onto the narrow roadway, blocking it. She cannot be moved for several hours. To save the imperiled persons, Jose would need to drive his truck over Sally, killing her, since the roadway is very narrow and lacks a driveable shoulder.

And

*Rescue II.* Same as Rescue I except that there is a pothole in the road, which makes it impassable. Jose cannot complete his rescue mission, except that it so happens that Sally through no fault of her own has fallen into the pothole, filling the gap in the roadway with her body. She is stuck there and, for now, cannot be moved. With Sally filling the pothole, the roadway is just barely useable at that spot. Jose can drive over the pothole and complete his rescue mission, but the weight of his truck driving over the pothole will bear down on Sally, harming her.<sup>10</sup>

Rescue I is governed by Alexander's mild consequence-regarding constraint against eliminative harming. In this example, the presence of Sally is no benefit to Jose, just an obstacle. Or more exactly, Sally's presence is no benefit to Jose, and the constraint against harming her in this situation is an obstacle to his acting to advance his ends. According to Alexander, the constraint that applies to this situation prohibits Jose from harming Sally unless the overall consequences of harming her are better than the overall consequence of refraining from harming her.

Rescue II is governed by the Means Principle, so the constraint against harming binds in a dramatically more restrictive fashion. Given that Jose would benefit from the presence of Sally on the roadway if he used the opportunity provided by her presence in a way that harmed her, harming her is absolutely forbidden. Whatever the consequences, it would be morally wrong all things considered for Jose to advance his ends by harming Sally. Doing so would be an instance of opportunistic agency, which is strictly forbidden (unless Sally has done something morally wrong that brings about forfeiture of her right not to be used by another without her consent to advance the other's ends). Let there be a million imperiled persons who can be rescued only if Jose proceeds; that detail makes no difference; the moral prohibition still binds. Let there be a billion imperiled who be saved only if Jose arrive at the accident site in time; no matter. Let the harm to Sally be as slight as you can conceive; same verdict.

In fact, we can imagine an example in which Sally is not harmed at all by being run over by the rescue vehicle. Its only effect on her might be to give her ailing back a slight jolt, which greatly lessens her chronic back pain permanently and so in objective well-being terms makes her much better off. No matter, according to the stern judgment of MP. Her body is being appropriated against her will, and this is absolutely forbidden by MP, which Alexander interprets as ruling out paternalistic appropriation. Each person is free to live as she chooses, using whatever she legitimately owns, without being used by others, provided she does not use others (and does not harm them in ways that are not defensible by an overall calculation of consequences).<sup>11</sup>

Proceeding in Rescue I would be fall in the category of what Judith Thomson (1991) has called Running-Roughshod-over-a-Bystander. She distinguishes this case from the category she calls Use-of-a-Bystander. Thomson sees the cases as morally similar.<sup>12</sup>

Thomson reports her opinion that the distinction between harmful agency that uses a person and harmful agency that does not has no moral significance in rendering what one does morally worse. Alexander opines that this distinction makes all the

difference. According to Alexander, in Substitution-of-a-Bystander and Riding-Roughshod-over-a-Bystander, it would be wrong to force someone to substitute or ride in order to advance the overall greater good. That would be to use the forced person in violation of the Means Principle. But if someone voluntarily chooses to do what would produce better consequences in these types of situations, there is no moral constraint against doing so, provided what one chooses to do really does bring about better consequences. By the same token, if this do-gooder could instead do something else that would bring about even better consequences, she is permitted to do that instead, but it would be wrong to force her to do what would bring about best rather than merely better consequences.

In contrast, there is an absolute, exceptionless moral bar against proceeding in Use-of-a-Bystander cases. The difference that Thomson says does not add to moral wrongness (moral taint) at all draws for Alexander a line in the sand marking out what is absolutely prohibited.

Insofar as I can muster any deontological convictions at all, I simply report that Rescue I and Rescue II seem to me at most slightly different. Granting that the difference between eliminative and opportunistic agency makes a difference, and that Sally's situation in Rescue II imposes a greater constraint to Jose's proceeding to complete his rescue mission than does Sally's situation in Rescue I, the difference is slight. In this judgment I am largely though not entirely echoing Thomson's judgment.

In passing I note that it is not clear to me that Alexander's casuistical reasoning regarding these varieties of cases is really true to his master principle. Consider:

*Alcove.* Two innocent people are fleeing from a tiger who intends to kill and eat them. They can save themselves by jumping together into an alcove, but by doing so they will dislodge a large man already standing in the alcove, causing him to fall to his death.

The consequences of jumping together are better than the consequences of refraining from jumping. Two deaths would be worse than one. But I would suppose that from Alexander's perspective the case is underdescribed. If the large man has a right to be in the space he is occupying, what sort of right is this? If the alcove is unowned land or a public park, or private land whose owner has permitted the large man to come onto it, one might think the large man has a temporary property right over the land (and the space immediately above it) that he is currently occupying. Pushing him or otherwise causing him to exit the space violates his temporary legitimate property right, and this looks to be a violation of the Means Principle (see Quong 2009). But if this analysis is right, it applies in many at least of the cases Alexander seems to regard as governed by a mild consequentialist constraint rather than the fiercely demanding Means Principle constraint. In Rescue I, why not say the person who falls on the road is occupying space she has a right to occupy, and running over that space with her occupying it then looks to be a violation of the Means Principle. Same goes for many of the standard Trolley cases.

One might resist this conclusion by maintaining that a pedestrian who crosses a roadway has a right to occupy the space her body traverses as it passes across the road only for the standard time it takes to cross. Falling on the road, one exceeds one's right to use and has no property right to be where one is. Or we might take a more driver-friendly view and say the pedestrian has a right to be on the roadway only insofar as this does not interfere with vehicle traffic flow. But then one needs an inquiry into the

temporary use rights of space in virtually every case in which the Alexander apparatus is deployed to determine what rights people have and what moral constraints are binding on agents in these circumstances.

Also, it looks as though, however this inquiry develops, the results will lead to counterintuitive implications for cases. In one case, one could turn a runaway trolley from a track where it is headed toward a child onto another track where it will also kill a child whose head on the tracks is positioned just slightly differently so that it will suffer just ever so slightly less than the child on the initial track would have suffered. The slight gain in consequences renders turning permissible. In another case, one could turn a runaway trolley from a track where it is headed toward—horror of horrors—a million children, who happen to be innocent trespassers, and who will all be killed if the trolley rumbles ahead on its present path. If one turns the trolley, it will unfortunately strike and kill one child, who has a right to be sitting on the track. The Means Principle will grind out the conclusion that turning the trolley in the second case is impermissible.

If MP is the sole deontological principle, then property rights will be set by consequentialist considerations so long as those considerations are not themselves countenancing violations of MP. (For example, according to Alexander's version of libertarianism, one could not endorse a property ownership principle that dictates that able individuals shall work to provide self-sustaining gardens that will be owned by individuals unable to labor for themselves and that will provide them food they need to live.) But if these property arrangements, justified by the consequences of their operation, then yield property rights in resources, which shelter under the strong protection of the Means Principle, then takings of property legitimately owned by an individual will be absolutely impermissible even though what makes the property rights legitimate is that their overall long-term operation satisfies whatever (MP-constrained) consequentialist principles we should accept. I am unclear exactly how these interactions of MP and consequentialism will play out but I am doubtful that their implications for permissible action and policy will attract our considered endorsement in ideally extended reflective equilibrium.

### **A punch aimed at left libertarianism.**

In an interesting aside, Alexander takes a swipe at left libertarians, who might be presumed to be his close allies. The left libertarian combines the ideas of private ownership of each person by that very person and equal ownership of the rest of the natural world. (There are complications here about the moral status of nonhuman animals that we can leave aside as irrelevant to present purposes.) The rough thought is that each individual person has a special moral status. She is entitled to live as she pleases so long as she does not thereby harm others in certain ways that intuitively count as wrongful. The natural world of land and minerals and oceans and air has a different status. It has no rights or entitlements; it is simply a good thing that it happens to be there, available for our use. No one has initial rights to this stuff more than anyone else, and since human individuals (who comprise all the persons we have encountered) enter the world at different times and need access to stuff in order to survive and thrive, a natural position is that each person no matter when he is born has an equal right to a fair share of natural resources unimproved by human labor. This equal world ownership claim is separate and distinct from the self-ownership idea; you could affirm the one without the other. But the

libertarian clearly needs to take some view as to how individuals might come to have rights to use and control stuff in the natural world. The left libertarian takes the view just sketched. It's a sketchy position; it needs to be filled out, and this could be done in different ways. One issue will be to balance the need for stability in property rights with the transformation of rights that occurs with each birth of a new person with her own entitlement to equal rights to a share of the unimproved earth. For property in things to be useful, there must be stability; I must know that if I plant crops, I will still own the land when harvest time comes. But maybe the reshuffling of rights that newborns occasion will give some newborns rights in what I had supposed was my land.

Alexander thinks the left libertarian project is misconceived from the start, because its initial idea about everyone having the same rights initially to all of the earth violates the means principle. He proposes an example along this line, which is supposed to reveal a deep problem in left libertarianism. Suppose the natural resources consist of fruit-bearing trees. You are short and can only reach the low-lying branches. Being taller, I can reach the higher branches. Alexander stipulates that any system of private ownership appropriation that allows you to appropriate the higher branches or to have a share of ownership of the higher branches straightaway violates the means principle, because in effect you are being given power to deny access and power to force those who can reach the high branches to labor for the benefit of the owners. The individuals who can reach the high branches but can only have access to them by sharing the fruits of labor with the owners unable to take any use of the branches themselves are being treated as means to advance the purposes of others. So left libertarianism dissolves in contradiction. So says Alexander.<sup>13</sup> An alternative way of putting his point would be to say that the left libertarian must repudiate the means principle, which shows that her true colors are not libertarian at all.

We should be puzzled by these Alexander assertions, and our puzzlement should ripen into flat denial of them. First of all, there is no forcing of some to work for the benefit of others in the world in which all adhere to left libertarian principles. Let's suppose in a two person world, the equal division of unimproved resources gives each of the two persons property ownership in one half of each tree from roots to treetop. Call the two persons Able and Unable. Unable owns property he cannot use. (If he were extremely unable, he would be unable to reach even the low-lying branches; according to Alexander, it would be a violation of libertarianism to allow him to appropriate any natural resources at all as his own.) What then? Unable has no right to force Able to work for his benefit or pick the ripe fruit on the high branches owned by able. No wrongful forcing occurs, we stipulate.

The property Unable has in the high tree branches may still be of use to him. He might just like looking at the fruit, enjoying the sight of swaying branches laden with brightly colored objects. Able might happen to want to help Unable, and might do so by picking some fruit from Unable's high branches (with his permission) and handing the produce to the owner. Here we should discern no insidious violation of self-ownership. Matters would be no different if Able and Unable reach an agreement, whereby Able picks the fruit from Unable's high branches and the fruit is divided in some agreed ratio between the two of them. Is there some subtle violation of self-ownership here? No. Each person is entitled to do whatever she wishes with whatever she legitimately owns (so long as she does not wrongfully use or harm others), and ex hypothesi Able does not

legitimately own Unable's high branch property. She gains legitimate access to it only with the consent of the rightful owner, Unable. Able's lacking legitimate access to these high branches that according to our stipulated version of left libertarianism belong to Unable without securing the owner's consent is not tantamount to forcing some to labor for the benefit of others.

Alexander's position also seems to make too much of too little. Suppose Unable is just barely able to reach the high branches, at great effort and cost. He can pick the fruit, but almost all of it drops from his hands and is wasted as he descends. In this respect he is just barely able. He then is not barred from being assigned ownership of the branches as part of some initial distribution of unimproved stuff, on the view Alexander suggests. If the natural resources available are extremely valuable, this slight difference between being strictly unable to use resources to which you might be assigned initial ownership and being just barely able to make use of them might make the difference between having no property and starving and having a generous share of property and living high on the hog. If we try to avoid this result by stipulating that your entitlement to appropriate unowned land varies continuously with the degree to which you could make productive use of the land if you had access to it, we are heading toward a view that gives most property rights to the most productive, and in which your entitlement to even a bit of natural resources can disappear if someone turns out to have sufficiently greater productive talent than you for putting the land to use.

Alexander's objection to left libertarianism thought through seems to involve assigning a vague and arbitrary right to natural ability. If this is what is going on, I see no reason to follow Alexander in embracing this ability entitlement.<sup>14</sup>

The modest conclusion to be drawn from this discussion is that acceptance of the Means Principle does not constrain the range of appropriation rules open to the libertarian in the way that Alexander supposes. Left libertarianism might be vulnerable on various fronts, but not this one.

### **Conclusion.**

Alexander's bold foray into the problem of formulating a plausible version of libertarianism is notable for its suggestions (1) that a single deontological constraint captures the properly enforceable limits on doing whatever would improve the world by an impartial measure of good consequences and (2) that this constraint is absolute and exceptionless, to be upheld whatever the consequences. Alexander is keenly aware that this unbending norm yields counterintuitive implications about permissible conduct in many scenarios. The claim that these implications for cases are truly counterintuitive presupposes that threshold deontology makes good sense. Alexander mounts a challenge to this presupposition. This essay has argued that the challenge cannot be sustained. Whether or not this is so, we should all recognize that Alexander's discussion illuminates issues that lie at the center of the deontological project. In particular, the idea that we can boil down deontology to a single common-sense idea, the Means Principle, is provocative and promising. However, under scrutiny, this provocation looks less promising. Finally, Alexander's spirited attempt to use the Means Principle as a club for clobbering left libertarianism also fails. For all that has been said, something in the neighborhood of the Means Principle might yet prove to be part of a plausible deontological doctrine, but not its entirety.

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<sup>1</sup> . This is not to say that considerable progress has not been made in the vast literature on the structure of nonconsequentialism in recent years. See the able discussions in Kamm (2008) and the many references she cites.

<sup>2</sup> . If I believe I am killing you and intend to be killing you but am only stroking your cat, my act is not morally impermissible provided it does not involve an appropriation of the cat you own in ways that causally work to my advantage. So Alexander, denying the relevance of intention to permissibility, will assert.

<sup>3</sup> . For an introduction, see Smart and Williams (1973), Hare (1981), Railton (1984), Scheffler (1994),

<sup>4</sup> . The statement in the text follows Alexander's exposition, but is not quite correct as it stands. Alexander supposes that on the threshold view he considers, if it is permissible for someone to override someone's right not to be used for the benefit of others, this is tantamount to affirming that the individual whose right has been overridden has an affirmative duty to supply by his own agency whatever another is permitted to take from him. For example, if it is permitted to take someone's car and use it to protect some third party's moral rights or well-being, then that individual has a moral duty to turn over his car for this purpose.

I doubt this moral equivalence obtains. The reason for this lack of equivalence was pointed out by Thomas Nagel long ago. Imposing on someone a positive duty to make a large sacrifice for the sake of helping some others puts an enormous burden on his will. It can be psychologically very difficult to bring oneself voluntarily to undertake such a sacrifice, and requiring an individual to make this effort of will may be more than should be morally required of him. In contrast, in some settings, permitting a third party (for example) to kill a person for the sake of saving some number of others may place no strain at all on the person's will. I may be just sitting near the trolley track, and the third party can just shoot me, or push me onto the track, resulting in my demise and the saving of some other people from peril. This is unfortunate for me, a distressing occurrence, but need not call on me to make any decision or effort of will at all, much less a difficult or heroic effort.

The further question arises, whether the person who has no affirmative duty to sacrifice his life by voluntary undertaking for the sake of several others in the circumstances just described, would be morally permitted to resist a third party's using him (permissibly) for the sake of the greater good. If I am sitting on the trolley track and happen to see the third party about to shoot me or push me to advance the greater good, and I discern that he is acting permissibly, may I seek to stop him to save my life, since *ex hypothesi* I have no positive duty to sacrifice my life here? My sense is that this question could be answered either negatively or positively consistent with the Nagel type position being sketched.



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<sup>5</sup> . See Alexander 2008.

<sup>6</sup> . To be fair to Alexander, it should be noted that he sees clearly the rumbling menace of an expansive skepticism about commensurability that cannot be rationally cabined. He is aware of the threat of skepticism and open to it. Here I simply report my own conviction that it is worse (for example) to refrain from telling lie about a small matter when refraining would bring about significant bad—not on the scale of moral catastrophe, just a garden-variety everyday bad occurrence—is far stronger than my doubts that incommensurability is pervasive in normative judgment calls. The reasons given by the wrong of the small lie added to the small harm that telling it would bring about are smaller than the reasons given by the wrong of the significant harm that not telling it would bring about. On this issue, see Dworkin (1996).

<sup>7</sup> . For that matter, there are different dimensions of such values as fun and friendship and virtue, so merely arriving at an all things considered fun assessment, for example, requires the weighing of disparate things.

<sup>8</sup> . Alexander 2000, at 900.

<sup>9</sup> . Alexander 2000, at 900-901.

<sup>10</sup> . For another assessment of such cases see Frowe (2015), chapters 1 and 2.

<sup>11</sup> . I myself see Alexander's commitment to paternalism—and not merely to paternalism but to an unbending absolutist paternalism—as another intuitively unappealing feature of his view. The paternalism at issue here is roughly restriction of a person's liberty for her own good against her will. But mere assertion here is not going to gain those of us who are pro-paternalistic any argumentative leverage against Alexander and his followers. They are perfectly well aware of this implication and regard it with equanimity. A qualification: Alexander reports that he regards the absolute exceptionless character of MP as intuitively troublesome (Alexander 2004). He clearly regards embrace of MP as nonetheless all things considered plausible, because the only candidate alternative view that does not just repudiate MOP altogether, namely, threshold deontology, proves under examination to be an unstable position, ultimately indefensible. Although this essay defends threshold deontology, the defense leaves open the possibility that in the end this doctrine DOES prove to be an unstable position, swept away by the attractive pull of the best version of act consequentialism.

<sup>12</sup> . Thomson 1991, at 291.

<sup>13</sup> . The situation is more complicated than is hinted at in the text. Alexander is alert to the complications. For one thing, in a world with more than two persons, a resource may be inapt for common distribution with respect to C but apt with respect to A and B, and with more persons, more complications ensue. One must also consider natural resources improved by creative inventions introduced by one person that would have been produced anyway by later persons.

<sup>14</sup> . Suppose we have a variant of Alexander's two person world. The two persons we can call Industrious and Lazy in recognition of their traits. Both are able to reach all branches of the fruit trees that make up the natural world. Lazy has extreme aversion to work and would not want to labor even if the alternative were slow death from starvation. Industrious wants to work and save and build up his wealth. As I understand Alexander, his animadversions on left libertarianism do not rule out assigning initial property ownership to both Industrious and Lazy. The predictable result is then that the two reach

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a deal whereby Industrious picks the fruit on the trees or tree branches Lazy owns and they share the picked fruit according to some agreed ratio. This social arrangement does not violate the Means Principle; the scenario depicted is just a libertarian society in operation. What then entitles Lazy to appropriate is that he has the ability to make some use of the thing he appropriates; he could use it, even though he certainly won't. Lacking the ability to make some use of the thing, Unable lacks any right to appropriate.